SITNASUAK NATIVE CORP.

IBLA 84-319 Decided March 11, 1986

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting in part a Native village selection because the land, which had been acquired by the United States, was reserved for national defense purposes and, therefore, was not available for selection. F 014908-A.

Affirmed.

1. Alaska: Alaska Native Claims Settlement Act--Alaska Native Claims Settlement Act: Native Land Selections: Village Selections

   Under the Alaska Native Claims Settlement Act, the key prerequisite to a village corporation's selection of land was the land's availability for withdrawal under sec. 11(a), 43 U.S.C. § 1610(a) (1982). If not so withdrawn, it could not be selected by a village corporation under sec. 12(a), 43 U.S.C. § 1611(a) (1982).

2. Alaska: Alaska Native Claims Settlement Act--Alaska Native Claims Settlement Act: Native Land Selections: Village Selections

   The provision "withdrawn or reserved for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), includes not only lands formally withdrawn but also embraces those lands which have been effectively reserved for such use.

3. Alaska: Alaska Native Claims Settlement Act--Alaska Native Claims Settlement Act: Native Land Selections: Village Selections

   The language "for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), does not create a special category of lands within those under control of the Department of Defense, but rather serves to distinguish lands held by the military from those held by other federal agencies.

APPEARANCES: John R. Vacek, Esq., Nome, Alaska, for appellant Sitnasuak Native Corporation; Robert C. Babson, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Sitnasuak Native Corporation (SNC), the Native Village Corporation for Nome, Alaska, has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated December 23, 1983, rejecting its selection of the area known as the Nome Tank Farm located within one of its core townships. 1/ SNC's application was filed to select village lands pursuant to the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. §§ 1601-1627 (1982). The application was timely filed on June 17, 1974, and was assigned BLM case file number F 014908-A. BLM rejected the inclusion of the land within the Nome Tank Farm in the application on the grounds that the lands "were reserved and utilized for national defense purposes and were not available for selection during the selection period."

The Nome Tank Farm is a parcel of approximately 6.58 acres within sec. 26, T. 11 S., R. 34 W., Kateel River Meridian, and is located within or near the township boundary of Nome, Alaska. A mineral patent for the land was issued in 1926. 2/ It was eventually acquired by the United States Smelting and Refining Company, which in 1963 conveyed it to the United States. The tank farm itself was established in the early 1950's by the United States Air Force and has generally consisted of a number of large petroleum storage tanks, a pumping station, and related pipeline. Since 1957 the parcel has been leased to Standard Oil of California (Chevron), which until 1976 was required to make available to the Air Force several types of petroleum products. Some or all of the improvements may have since been removed.

On appeal, SNC argues: (1) that the parcel has not been "withdrawn or reserved for national defense purposes" under section 11(a) of ANCSA and so is subject to a determination of the extent of its use as a Federal installation under section 3(e); (2) that the land was in fact not used by the

1/ Bering Straits Native Corporation also filed a notice of appeal which was received by BLM in Alaska on Feb. 1, 1984. This notice was not timely filed, 43 CFR 4.411, and no statement of reasons has been filed. Bering Straits Native Corporation is, therefore, dismissed as a party to this appeal. 43 CFR 4.402.

2/ The City of Nome at one time opposed approval of SNC's selection of the Nome Tank Farm on the grounds that the city owned the parcel, having originally obtained title to it in 1906 as part of its original townsite grant based on U.S. Survey No. 451. Apparently the same parcel was also included in Mineral Survey No. 1339 for which a patent was issued in 1926 to the Nome and Sinook Mining Company. The City of Nome later withdrew its objection to the selection by SNC. The question of whether the United States now can convey good title to the Nome Tank Farm is not before us in this appeal.

Department of Defense during the 3-year period for selection by Native villages and so was not exempt from selection under section 3(e); and (3) that the regulations at 43 CFR Subpart 2655, promulgated under section 3(e), require that the parcel be conveyed to SNC. In response, BLM argues that: (1) the land was in fact reserved for national defense purposes within the meaning of section 11(a) of ANCSA; and (2) therefore whether or not the parcel is "public lands" under section 3(e) is irrelevant. Thus, as presented by the parties, the issues of this appeal are whether the Nome Tank Farm was "withdrawn or reserved for national defense purposes" under section 11(a) and, if not, whether it was available as "public land" under section 3(e).

Both parties have addressed the issue of the application of section 11(a) based on two cases decided by the Alaska Native Claims Appeal Board (ANCAB). 3/ While the Board of Land Appeals is not bound by these decisions, they are important Departmental precedent which we will consider.

The Appeal of Paug-Vik, Inc., 3 ANCAB 49, 85 I.D. 229 (1978), concerned lands withdrawn and reserved for use by the Federal Aviation Administration (FAA) in 1950 but subsequently used by the Air Force under a permit from the FAA. In 1967 or 1968 the FAA notified the Air Force of its intent to relinquish the lands. The Army Corps of Engineers then filed an application with BLM to withdraw a portion of the lands for Air Force use. Prior to the application, the Secretary of the Interior, in 1966, had instituted a "land freeze" suspending land dispositions, which was subsequently formalized in 1969 as Public Land Order No. 4582, 34 FR 1025 (Jan. 17, 1969). ANCAB found that the temporary segregation of land included in an application for withdrawal which was provided by 43 CFR 2091.2-5 and 43 CFR 2351.3 (1978) 4/ did not constitute a withdrawal so as to qualify as a "withdrawal or reservation for national defense purposes" under section 11(a). Id. at 55, 85 I.D. at 239.

The Appeal of Tanacross, Inc., 4 ANCAB 173, 87 I.D. 123 (1980), concerned land which had been formally withdrawn for use by the Department of the Army in connection with the operation of a pipeline. In the early 1970's the pipeline had been declared excess and steps were taken to relinquish the withdrawal. ANCAB found that the withdrawal had been for national defense purposes and that nothing had occurred prior to the deadline for village selection to terminate the withdrawal. The result, it concluded, was that the land was excepted from selection under section 11(a). Id. at 204-205, 87 I.D. at 137-38.

Based on its interpretation of Paug-Vik and Tanacross, appellant argues that only a formal "withdrawal or reservation of land for national defense purposes" prevents the land's withdrawal under section 11(a). Therefore,

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3/ ANCAB was abolished by Secretarial Order No. 3078, dated Apr. 29, 1982, effective June 30, 1982. See 43 CFR 4.1(b)(3)(i), 47 FR 26390 (June 18, 1982) (delegating to IBLA jurisdiction over appeals from decisions relating to land selections arising under ANCSA).
4/ Similar provisions now appear at 43 CFR 2310.2.

under appellant's analysis, subject to a section 3(e) determination as to actual use of the land, in the absence of a formal withdrawal, the land is available for selection by a Native village. In particular, SNC argues that because the Nome Tank Farm was not formally withdrawn or reserved, and because it was not actually used by the Air Force, it was available for selection.

We do not read the holdings of the cases so broadly. While Tanacross clearly holds that a formal withdrawal for use by the military is sufficient to preclude withdrawal under section 11(a), it does not follow that a formal withdrawal or reservation is the only basis under which lands are excluded under the section. Though the decision in Paug-Vik did suggest such a conclusion, the actual issue before ANCAB was only the more limited question whether a segregation under 43 CFR 2091.2-5 and 43 CFR 2351.3 (1978) constituted a "withdrawal or reservation for national defense purposes" under section 11(a). Its analysis of that provision was not sufficiently extensive to support its broader conclusion. Because neither Paug-Vik nor Tanacross provides a direct resolution of the present case, we turn to an analysis of ANCSA itself and section 11(a)'s legislative history to understand the scope of this provision.

ANCSA was enacted to provide a "fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a) (1982). To achieve this purpose, the Act extinguished all claims based on aboriginal right, title, or use and, in exchange, authorized, inter alia, the conveyance of approximately 40 million acres of land to Native village and regional corporations.

In order to assure that the lands available as of the date of the Act's passage would continue to be available for selection, the Act withdrew the "public lands" in each township enclosing all or part of a Native village and in two tiers of townships surrounding these townships. 43 U.S.C. § 1610(a)(1) (1982). Excepted from this withdrawal were "lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4." Id. For the purposes of ANCSA, the term "public lands" was defined in section 3(e) to mean

> all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969.

Id. § 1602(e). Selections of "public lands" by village corporations were required to be "made from lands withdrawn by section 1610(a)" and were to be made within 3 years of ANCSA's enactment. Id. § 1611(a)(1). In order to permit these selections, the lands withdrawn under section 11(a) were to remain withdrawn for 4 years except for lands actually selected by a village

or regional corporation or a Native group which would remain withdrawn until conveyed. Id. § 1621(h)(1).

[1] From the foregoing, it is clear that the key prerequisite to a village corporation's selection of land was the land's availability for withdrawal under section 11(a). If not so withdrawn, it could not be selected by a village corporation under section 12(a). Id. § 1611(a). Such a withdrawal could not occur if the land was either part of the National Park System or withdrawn or reserved for national defense purposes. Nor could the land be withdrawn if it was not "public land" because it was, inter alia, actually used in connection with a Federal installation. Appellant argues that since the land was not actually used in connection with a Federal installation it was not excluded from the section 3(e) definition of "public lands," and further that, since there was no formal withdrawal, the land was not excepted from the purview of section 11(a). Since, in our view the land was, in fact, not subject to withdrawal under section 11(a) regardless of its actual use, we need not reach the section 3(e) question.

[2] The relevant legislative history, although limited, indicates no intent to narrowly limit the scope of the section 11(a) exception. To the contrary, it indicates that the purpose of the provision was to give general protection to lands held by the military in order to prevent their selection by village corporations. The relevant history is discussed in both Paug-Vik and Tanacross and consists of comments submitted by the Air Force and the Department of Defense. The concern expressed was that the language of the exclusion be sufficient to protect the variety of lands held by the military and that the use solely of the term "withdrawal" in the proposed legislation would not do so. In addition, it is apparent that the exclusion in section 3(e) for "land actually used in connection with the administration of any Federal installation" was not viewed by either Congress or the commentators as providing sufficient protection for military concerns. The comments, however, did not survey specific needs, uses, or the types of lands which might be involved nor provide relevant examples of what was intended by the addition of the phrase "or reserved." In particular, they did not address the intended effect on land which had been acquired from private owners by the Department of Defense as is the case with the Nome Tank Farm. Consequently, while no clear inference can be drawn from the history as to the fate of acquired lands, the history does not support a narrow reading of the provision eventually enacted.

The broad range of lands to which ANCSA applies militates against a narrow construction of the exclusion for military lands. As quoted above, "public lands" are defined for the purposes of ANCSA to include "all Federal lands" except for those expressly excluded. Traditionally, "public lands" were considered to be only those portions of the public domain which had never passed from Federal ownership; and only public lands were available for the acquisition of private rights and disposal under the public land laws. See Newhall v. Sanger, 92 U.S. 761, 763 (1875); Bobby Lee Moore, 72 I.D. 505 (1965), aff'd sub nom. Lewis v. General Services Administration, 377 F.2d 499 (9th Cir. 1967); 40 Op. Att'y Gen. 9 (1941). Consequently, lands to which the United States acquired title by purchase, condemnation, or gift were generally not considered to be public lands and were not available for

disposal under the public land laws. Rawson v. United States, 225 F.2d 855, 858 (9th Cir. 1955), cert. denied, 350 U.S. 934 (1956); J. C. Babcock, 25 IBLA 316 (1976); Bobby Lee Moore, supra. Accordingly, there was never any reason to withdraw most acquired lands from the operation of the public land and mineral laws since those laws were inapplicable by their own terms. 5/ Practically speaking, acquired lands were effectively "reserved" for a specified use by the mere fact that they had been acquired.

Our analysis of the animating rationale for Congressional adoption of section 11(a) of ANCSA convinces us that it includes not only land formally withdrawn for military purposes but also land which has effectively been reserved for such purposes. Indeed, one might plausibly argue that all lands acquired by the Department of Defense are, in fact, "formally reserved" since no independent mechanism existed outside of withdrawals whereby land could be "reserved." The legislative history of section 11(a) clearly establishes that the phrase "or reserved" was added precisely because it was feared that the term "withdrawn" might prove too restrictive. We have no difficulty concluding that land acquired by the Department of Defense is "reserved" within the meaning of section 11(a) of ANCSA.

[3] Nor can we find that the language "for national defense purposes" creates a special classification of lands. That is, it does not create a special category of lands within those under the control of a division of the Department of Defense. Since the purpose of military forces is by definition national defense, it would be unreasonable for us to attempt to distinguish military use of land for national defense purposes from military use of land for other purposes. See Appeal of Tanacross, Inc., supra at 190, 87 I.D. at 130. Rather, the purpose of the statutory language is to distinguish lands held by the Department of Defense from lands held by other Federal agencies, and to provide the former with protection beyond that accorded the latter under section 3(e) of ANCSA. Thus, we hold that all acquired lands held by the Department of Defense qualify as lands "withdrawn or reserved for national defense purposes." In particular, we find that the Nome Tank Farm was acquired by the United States, was held by the Department of Defense, was exempted from withdrawal under section 11(a), and was, therefore, not available for selection by SNC. Accordingly, we affirm BLM's rejection of SNC's selection of the Nome Tank Farm as part of its acreage entitlement. 6/

5/ Indeed, such laws as did apply, as, for example, the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 351 (1982), expressly preconditioned issuance of a lease on the approval of the administering agency.

6/ BLM's decision was titled "Section 3(e) Determination/Village Selection Rejected in Part." In describing its decision, BLM stated that it was rejecting the application for the Nome Tank Farm because the lands had been "reserved and utilized for national defense purposes." There is no requirement under section 11(a) that lands be utilized for national defense purposes. By regulation, lands withdrawn or reserved for national defense purposes are not subject to a determination as to the scope of present use under section 3(e). 43 CFR 2655.1(b). Because we find that the Nome Tank Farm was exempted under section 11(a), we do not reach the question of its status under section 3(e).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge.